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In The Supreme Court of The United States

OCTOBER TERM, 1944

No. 462

J. F. FITZGERALD CONSTRUCTION COMPANY,
Petitioner,

vs.

CHRIS PEDERSEN, *Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,*
Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF THE STATE OF NEW YORK

HENRY E. FOLEY,
Counsel for Petitioner.

Dated: September 11, 1944

GEORGE H. OEAN CO., PRINTERS, BOSTON

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CHRIS PEDERSEN, *Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,*
Respondent.

Now comes J. F. Fitzgerald Construction Company, your petitioner, by Henry E. Foley, its counsel, and moves this Honorable Court that it shall by certiorari or other proper process directed to the Supreme Court of the State of New York require said Court to certify and remove to this Court for its review and determination, a certain cause lately pending in said Court, wherein your petitioner was defendant-appellant and Chris Pedersen, individually and as agent and representative, was plaintiff-respondent, and to that end your petitioner aforesaid now tenders herewith its petition with a certified copy of the record in said cause.

HENRY E. FOLEY,
Counsel for Petitioner

Dated: September 11, 1944

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Now comes your petitioner, J. F. Fitzgerald Construction Company, and respectfully represents to this Honorable Court as follows:

STATEMENT OF THE MATTERS INVOLVED

1. The judgment, review of which is sought in this proceeding, was entered by the Supreme Court of the State of New York, upon remittitur from the Court of Appeals of said State, in an action commenced in said Supreme Court by the plaintiff,[1] Pedersen, individually and on behalf of

[1] The terms — plaintiff — and — plaintiffs — as hereinafter used mean the plaintiff, Pedersen, and those persons on whose behalf he is suing.

certain other former employees of your petitioner, for the recovery of overtime wages and liquidated damages alleged to be due by virtue of the provisions of the Fair Labor Standards Act of 1938 (29 U. S. Code 201 et seq.).

2. The action was tried, pursuant to stipulation, on an agreed statement of facts in lieu of proof, (R. 9) and findings were made by the Trial Judge, in accordance with said agreed statement, of which the following are pertinent to this proceeding:

"That The New York Central Railroad Company, as lessee of the Boston and Albany Railroad, operated trains between the States of New York and Massachusetts over four bridges located on the railroad right-of-way in the Town of Chatham, Columbia County, New York."

"That in September 1938, abutments supporting two of said bridges were completely washed out and destroyed and the substructures of the other two bridges were damages by a flood."

"That thereafter, the railroad company entered into a contract with the defendant, an independent contractor engaged in general construction work, for the construction of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as aforesaid, and for repairing the substructures of the other two bridges which had been damaged, as aforesaid."

"*That defendant employed plaintiffs,* together with other individuals, *as its employees in doing work under said contract* and paid them at the rates per hour, as shown on Schedule 'A' annexed to said stipulation of December 1, 1939."

"That after October 24, 1938, until the completion of said work by the defendant under said contract, *each plaintiff worked for the defendant* the number of hours per week and was paid by the defendant at the hourly rate of pay as shown on Schedule 'A' annexed to said stipulation of December 1, 1939." (Italics supplied) (R. 9-10).

3. No finding was made, and nothing in the record would warrant a finding, as to the particular work done for the defendant by any plaintiff at any time.

4. After trial, the complaint was dismissed by the Trial Court (R. 18) and the dismissal was sustained first by the Appellate Division of the Supreme Court (R. 18) and thereafter by the Court of Appeals (R. 27), the ground of dismissal being that, as the petitioner was engaged in local construction work not constituting interstate commerce, none of the plaintiffs could have been engaged in commerce. (R. 14, 21).

5. The plaintiff thereupon filed in this Court a petition for certiorari. On February 1, 1943, while the plaintiff's petition for certiorari was pending, this Court rendered its decision in *Overstreet* v. *North Shore Corporation*, 318 U. S. 125. That decision established that the ground underlying the decisions of the New York courts herein (namely that the nature of the employer's business, rather than the nature of the employees' activity, was controlling) was unsound. Accordingly, this Court, without hearing argument, entered an order directing that the judgment of the Supreme Court of the State of New York "be and the same hereby is reversed with costs on the authority of *Overstreet* v. *North Shore Corporation*, No. 284, decided February 1, 1943" and that "this cause be and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court" (318 U. S. 740).

6. Upon notice of said order of this Court, your petitioner, recognizing that under the Fair Labor Standards Act of 1938, as interpreted in the *Overstreet* decision, no plaintiff was entitled to recover on the record before this Court but fearing that the order of reversal of this Court

would be misconstrued as indicating that the plaintiffs were considered to be entitled to recovery on said record, filed in this Court its petition for rehearing wherein your petitioner pointed out:

1. That under the *Overstreet* decision, recovery depends upon a showing of the particular work which a plaintiff has done and that such work was so closely related to commerce "as to be in practice and in legal contemplation a part of it"; and

2. That on the record herein no showing was made of the particular work done by any plaintiff and that, therefore, there was no showing that the activity of any plaintiff was at any time so closely related to commerce "as to be in practice and in legal contemplation a part of it".

7. Upon consideration of your petitioner's application for rehearing, this Court amended its order by adding, after the direction that the cause be remanded for further proceedings not inconsistent with the opinion of this Court, the following caveat:

"and without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought." (R. 30) (318 U. S. 742).

This Court thus not only negatived any possible inference that by reversal it had concluded that the plaintiffs had established their case but also affirmatively indicated that such a determination was a prerequisite to the entry of judgment for any plaintiff.

8. Notwithstanding the decision in the *Overstreet* case and the mandate of this Court, the plaintiff moved in the Supreme Court of the State of New York for summary judgment upon the original record in these proceedings, being the record which this Court had previously considered. The Supreme Court granted the plaintiff's motion for

summary judgment and included interest on the double damages allowed (R. 42). In its opinion the Supreme Court adopted the following test of coverage under the Act:

> "In a case such as this the test must necessarily be whether the activities of complaining employees were *substantially related to the repair* of interstate transportation facilities." (Italics supplied) (R. 45)

The Court concluded that the record, which was the record formerly before this Court, showed that the activities of the plaintiffs were *substantially related* to the repair of interstate transportation facilities (R. 46). The Supreme Court was sustained in its action by the Appellate Division, Third Department, (R. 51). The Appellate Division sustained the Supreme Court decision without a majority opinion (R. 51). Mr. Justice Schenck dissenting submitted an opinion in which he rejected the test of coverage advanced by the Court below as not consistent with the decisions of this Court, pointing out that this Court had

> "recognized that an employee's task may be substantially related to repair work upon an instrumentality of interstate commerce, and yet may not be 'so closely related to interstate transportation as to be in practice and legal relation a part thereof.' " (R. 55).

The Court of Appeals thereafter sustained the decisions below. Apparently the test of coverage adopted by the State Supreme Court was accepted, for the Court of Appeals stated in its opinion:

> "The case was originally submitted upon an agreed statement of facts which has never been altered in any way. It is thereby stipulated that the work on which the plaintiffs' claims are based was done by them under contract through which the defendant undertook with a railroad company to reconstruct two bridges that were instrumentalities of interstate commerce." (262 App. Div. 665, 667). These conceded facts are now said by the de-

fendant to be insufficient as a basis for disposition of the issue as to whether the plaintiffs were 'engaged in commerce' at the time they were so employed.

"We concur with the courts below in their rejection of that contention. The agreed statement of facts *on the face of it* was a case within the statute." (Italics supplied) (R. 64)

9. On remittitur from the Court of Appeals the order and judgment of that Court were made the order and judgment of the Supreme Court of the State of New York.

10. Your petitioner seeks review of said judgment.

JURISDICTION

11. The jurisdiction of this Court to issue the writ requested herein is based upon Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. Code, Title 28, § 344 (b)).

PRIOR OPINIONS IN THESE PROCEEDINGS

12. The opinion of the Court of Appeals of the State of New York, handed down June 14, 1944 (R. 63) is reported at 293 N. Y. 126. The decision (without majority opinion) of the Appellate Division, Third Department, of the Supreme Court of the State of New York, handed down November 18, 1943, (R. 51) is reported at 266 App. Div. 1032. The opinion of the Supreme Court of the State of New York, handed down May 21, 1943, (R. 43) is unreported. The per curiam opinions of this Court, handed down February 8, 1943 and March 8, 1943, respectively, are reported at 318 U. S. 740 and 318 U. S. 742, respectively. The prior decision (without opinion) of the Court of Appeals of the State of New York, handed down June 18, 1942, is reported at 288 N. Y. 687. The prior decision of the Appellate Divi-

sion, Third Department, of the Supreme Court of the State of New York, handed down November 15, 1941, is reported at 262 App. Div. 665; and the prior opinion of the Supreme Court of the State of New York, handed down March 2, 1940, is reported at 173 N. Y. Misc. 188.

STATUTE INVOLVED

13. The statute involved is the Fair Labor Standards Act of 1938 (U. S. Code, Title 29, S. 201 et seq.), the pertinent provisions of which are set forth in an appendix hereto.

QUESTIONS PRESENTED

14. Your petitioner seeks consideration and review of the following questions:

(1) Whether the entry of judgment for the plaintiffs by the Supreme Court of the State of New York on the record before it (which wholly fails to show the nature of the work done by any plaintiff at any time, except merely that your petitioner entered into a contract for the reconstruction and repair of certain bridges of an interstate carrier and that the plaintiffs and others were employed by your petitioner "in doing work" under that contract) is in conflict with the decisions of this Court and constitutes a violation of the prior mandate of this Court.

(2) Whether interest may be added to the statutory double damages in making an award to employees in an action under Section 16 (b) of the Fair Labor Standards Act of 1938.

REASONS IN SUPPORT OF PETITION

15. The Court of Appeals of the State of New York has misinterpreted the mandate of this Court and has decided a federal question of substance (by holding that an employee is entitled to recovery under Sec. 16 (b) of the Fair Labor

Standards Act of 1938 on a mere showing that his employer entered into a contract to repair instrumentalities of commerce and that the employee did work under the contract, without any showing as to the nature of the work at any time done by such employee) not only in conflict with the decisions of this Court but in direct conflict with the mandate of this Court entered at a prior stage of this proceeding. And such decision, if not corrected, will create uncertainty with respect to the coverage of the Fair Labor Standards Act in that large field of employment consisting of employment in work related to the repair and reconstruction of instrumentalities of commerce, including not only employment in work related to the repair and reconstruction of railroad bridges and rights of way but also employment in work related to the repair and reconstruction of public highways, streets, and bridges, air fields, telephone transmission lines, gas mains, water mains and electric transmission lines, to mention only some of the employment fields affected.

(1) The Court of Appeals has decided a federal question of substance in conflict with the decisions of this Court and under circumstances calling for review by this Court.

(a) Under the decisions of this Court, no plaintiff herein is entitled to judgment in the absence of a showing that his individual activity constituted commerce or was so closely related to commerce "as to be in practice and in legal contemplation a part of it." That an employee seeking judgment under the Fair Labor Standards Act of 1938 has the burden of proving that he comes within the coverage of the Act was established by this Court in *Warren-Bradshaw Drilling Company* v. *Hall*, 317 U. S. 88, 90 (1942), but this Court did not, until the *Overstreet* decision, interpret the words "engaged in commerce" as used in the Act. The

Overstreet decision and the subsequent decision of this Court in *McLeod* v. *Threlkeld*, 319 U. S. 491 (1943), however, unequivocally established that whether an employee performing work related to the repair of an instrumentality of commerce is "engaged in commerce" within the meaning of those words in the Act is determined by the character of the particular activity of the individual employee; that the test of engagement in commerce under the Act is whether the activity of the individual employee, if not in fact an activity constituting "commerce", is at least so closely related to commerce "as to be in practice and in legal contemplation a part of it"; and that, in applying such test, the same standard should be applied as was applicable in determining employment in commerce under the Federal Employers' Liability Act, since "Congress in adopting the phrase 'engaged in commerce' had those Federal Employers' Liability Act cases brought to its attention."

(b) The Court of Appeals of the State of New York has affirmed the entry of judgment for the plaintiffs on a record which is wholly devoid of evidence as to the particular activity of any employee or as to closeness of the relation of such activity to commerce. The record establishes only that your petitioner entered into a contract with an interstate carrier for the construction of new abutments for two bridges and repair work upon sub-structures of two other bridges owned by the carrier; that the plaintiffs (and others) were employed by your petitioner in "doing work under the contract" and that the plaintiffs in fact "worked" for your petitioner. (R. 9-10). The particular work done by any plaintiff at any time nowhere appears in the record. Nothing in the record shows more than that the plaintiffs' work was in relation to a repair project and this was held to be an insufficient showing in the *McLeod* case. Nothing in the record affords a basis for applying the Federal Em-

ployers' Liability Act test of coverage held applicable to cases under the Fair Labor Standards Act in the *Overstreet* and *McLeod* decisions. The record, for example, provides no basis for a determination as to whether any individual workman was performing work which, however necessary, was only incidental to, or only preliminary to, or only expedited, the work being performed by other employees, as were the workmen in the cases which denied coverage under the Federal Employers' Liability Act and are cited with approval in the *Overstreet* and *McLeod* cases (see, for example *Chicago and Northwestern Railway Company* v. *Bolle*, 284 U. S. 74 (1931) and *Chicago and Eastern Illinois Railroad Company* v. *Industrial Commission of Illinois et al*, 284 U. S. 296 (1932)). The record affords no answer as to whether any particular plaintiff was at any time engaged in actual repair work on an instrumentality of commerce (as the employees in the *Overstreet* case were alleged to be) or was instead engaged, for example, only in setting up and maintaining stationary derricks, platforms and pile drivers, in oiling or cleaning machinery, in trucking or unloading supplies to be used when needed on the project, in the repair or sharpening of tools, or in any one of the many other preliminary or incidental occupations which, in the decisions in and following the *Bolle* and *Industrial Commission* cases (*supra*), have been held to be employments which are neither commerce nor so closely related thereto "as to be in practice and in legal contemplation a part of it." The record fails even to exclude any plaintiff from that substantial group of employees on any repair or construction project whose duties have absolutely no relation to the progress of the actual construction work but are concerned entirely with the salvage and disposition, solely for the contractor's benefit, of lumber and other materials which cannot further be used on the particular project. The

record gives not the slightest hint of the nature or character of any of the plaintiffs' particular activities.

(c) By affirming a judgment for the plaintiffs on a record which fails to show the particular activities of any plaintiff and which thus fails to enable a determination of the closeness of the relation of the activities of any plaintiff to commerce, the Court of Appeals has decided a federal question of substance in conflict with the decisions of this Court. The Court of Appeals has concluded, notwithstanding the holdings of this Court in the *Overstreet* and *McLeod* decisions, that the plaintiffs have established a case under the Act by showing merely that they performed work in connection with a repair project upon which the defendant was engaged and without any showing as to whether any plaintiff was, in any week for which overtime compensation is sought, actually engaged in repair work as distinguished from performing those many preliminary, incidental and subsequent operations which are required to be performed on any major repair job and which have been uniformly held not to constitute engagement in commerce under the Federal Employers' Liability Act cases. The Court of Appeals said:

> "The case was originally submitted upon an agreed statement of facts which has never been altered in any way. It is thereby stipulated that the work on which the plaintiffs' claims are based was done by them under a contract through which the defendant undertook with a railroad company to reconstruct two bridges that were instrumentalities of interstate commerce." (R. 64).
>
> "The agreed statements of facts *on the face of it* was a case within the statute." (Italics supplied) (R. 64)

The error of the Court apparently lies in its having accepted the test of coverage advanced by the Trial Judge who had held that:

". . . the test must necessarily be whether the activities of complaining employees were substantially related to the repair of interstate transportation facilities." (R. 45).

The error in such a test was indicated by Mr. Justice Schenck in his dissenting opinion in the Appellate Division when he pointed out that:

". . . an employee's task may be substantially related to repair work upon an instrumentality of interstate commerce, and yet may not be 'so closely related to interstate transportation as to be in practice and legal relation a part thereof.'" (R. 55)

And when he gave the following illustrations:

"Thus, plaintiff A would be entitled to recover if his task was to tamp ballast between the ties of the tracks. (*N. Y. C. & R. R. Co.* v. *Winfield*, 244 U. S. 147). Not so plaintiff B if his task was to supply dry sand to an engine used in the work of construction and repair. (*Erie R. R. Co.* v. *Szary*, 253 U. S. 86, as overruled in *Chicago & Eastern Ill. R. R. Co.* v. *Ind. Comm.*, 288 U. S. 296). Plaintiff C could recover herein if his job was to flag trains in transit interstate over the tracks while the work of construction and repair was in progress. (*Phila. & Reading Ry. Co.* v. *DiDonato*, 256 U. S. 327). But not plaintiff D if he was a cook who prepared and served meals for the repair and construction gang. (*McLeod* v. *Threlkeld, supra*). (R. 56).

But whatever the reason for the error of the Court of Appeals, that Court plainly erred. It is obvious that on the facts of record no plaintiff could conceivably be thought to have established employment in commerce sufficient to constitute compliance with the test of the Federal Employers' Liability Act cases, held by the *Overstreet* and *McLeod* decisions to be controlling under the Fair Labor Standards Act of 1938. Nothing in the record enables a determination that any plaintiff was engaged at any time in

commerce or in activity "so closely related to commerce as to be in practice and in legal contemplation a part of it."

(d) While this Court has a vital interest in the proper decision by State courts of Federal questions of substance, there are particularly strong considerations in this proceeding which call for review. The crucial issue herein concerns the test of coverage in the case of employees, of whom there are thousands, engaged in work related to the repair and reconstruction of instrumentalities of commerce. *The instant case is a leading case in the field.* If a writ herein is denied, a heavy cloud of uncertainty will fall upon the question of coverage. Enforcement agencies will inevitably insist (and some, at least, are now insisting) that employees engaged in repair projects are covered by the Act whether their work be itself repair work or one, two or three stages removed. The test laid down in the *Overstreet* and *McLeod* cases will inevitably be treated as modified, if review herein is denied, with the unfortunate consequence that employers will be uncertain of their obligations and employees of their rights. In so important a field, the law should not be permitted to become confused.

(2) The Court of Appeals has decided the proceeding below in conflict with the mandate of this Court and the disregard of said mandate should be reviewed by this Court.

(a) Even if the original order herein had not been amended by this Court it would have precluded the entry of judgment for any plaintiff *on the present record.* The order, as originally issued, required that the cause be remanded for further proceedings consistent with the opinion of this Court. The New York courts, having decided the case on the ground that the nature of the employer's activity was controlling, were held to have erred and judgment was reversed. The requirement of the order was that the New

York court decide the case in accordance with the law laid down in the *Overstreet* case. That case held, as has hereinbefore been pointed out, that the nature of the employees' activity, and not that of the employer, was controlling, and held applicable the Federal Employers' Liability Act test of engagement in commerce. As the nature of the employees' activity does not appear in the record and as the test held by this Court to be governing could not on the record be shown to have been satisfied, a decision on the record for any plaintiff necessarily conflicted with the mandate. No plaintiff has sustained the burden of showing that his activities constituted commerce or were so closely related to commerce "as to be in practice and in legal contemplation a part of it" as required by the *Overstreet* decision and the order of this Court.

(b) While the order of this Court in its original form (requiring, as it did, subsequent proceedings in conformity with the law laid down in the *Overstreet* decision) precluded a judgment for any plaintiff on the present record, the amendment clarifying the mandate makes even more clear the requirement that no plaintiff be awarded judgment on that record. As hereinbefore pointed out, when the original order was issued, your petitioners (recognizing that on the record then before this Court no plaintiff was entitled to recovery under the law laid down by this Court, but fearing that the order of reversal might lead the New York courts to believe that this Court had concluded that the plaintiffs had established their case) filed herein a petition for rehearing, pointing out that on the record before this Court the plaintiffs had not established their position under the interpretation of the Act held by this Court to be proper. This Court thereupon amended its mandate by the addition, after the direction that further proceedings be had not inconsistent with the opinion of this court, of the words:

"and without prejudice to a determination of the nature of the employment of *any* members of the class on whose behalf this suit has been brought." (Italics supplied) (R. 30).

By the amended mandate this Court (1) made clear that to recover the plaintiffs must show [2] the nature of their employment in order that the tests of the *Overstreet* case might be satisfied and (2) negatived any possible inference that this Court had considered that the plaintiffs had satisfied the *Overstreet* test and were entitled to judgment. The "determination of the nature of the employment of *any* members of the class on whose behalf this suit has been brought", required by the amended mandate, could not be made on the record then before this Court. The record then before this Court (which is the same in this regard as the present record, no further showing of the activity of any of the plaintiffs having been made) showed nothing which would enable a determination that any plaintiff was engaged in commerce or in activity "so closely related to commerce as to be in practice and in legal contemplation a part of it." Such determination could only be made on a reopened or new record showing the particular activity of the individual plaintiffs. But the plaintiffs did not have the record reopened or a new record established.[3] They sought judgment on a record upon which the determination required by this Court's mandate could not be made. The Court of Appeals

[2] Clearly this Court did not intend to shift the burden of proof to your petitioner. Such a construction of the mandate would be in conflict with the well-established law of this Court that under the Act employees have the burden of establishing coverage (*Warren-Bradshaw Drilling Company* v. *Hall* (*supra*).

[3] See footnote (2). There is some question whether under the applicable law plaintiffs were entitled to reopen, but that issue is not here involved. The plaintiffs moved for summary judgment on the original record.

in affirming judgment for the plaintiffs on such a record ignored the caveat of this Court that a judgment for any plaintiff required a showing of the nature of that plaintiff's activity so that a determination might properly be made that he had satisfied the test of the *Overstreet* case. As was stated by Mr. Justice Schenck in his dissenting opinion in the Appellate Division:

> ". . . it is apparent that the Supreme Court thus modified, on March 8, 1943, its judgment of the previous February 8th, because it recognized the need for proof of his engagement by defendant in interstate commerce before any plaintiff could recover herein." (R. 54)

Such proof was not forthcoming.

(c) Not only does this case present a Federal question of substance which should be decided by this Court but it presents, in addition, a question as to whether the mandate of this Court has been complied with. This Court, as any Court having once taken jurisdiction, has a strong interest in securing compliance with its orders. As this Court's mandate has not been complied with, this Court should review the action of the New York courts for reasons additional to those arising from the important and far reaching Federal question involved. This Court having entered an order which deprived your petitioner of the relief originally granted it (though it is conceded that such relief was granted on erroneous grounds) should, it is submitted, protect your petitioner from an erroneous disregard of the mandate of this Court depriving your petitioner of the relief to which it is entitled.

16. The Court of Appeals of the State of New York has also decided a further federal question of substance, (to wit, whether interest may be added to the statutory double damages in awarding judgment to employees under section 16 (b) of the Fair Labor Standards Act of 1938). This

question is novel and has not yet been reviewed by this Court.

(1) The Court of Appeals, in affirming an award to the plaintiffs of interest on statutory double damages, has erroneously decided a federal question of substance.

(a) The Fair Labor Standards Act of 1938 does not authorize the inclusion of interest in a judgment rendered thereunder; rather, properly construed, it precludes such an award. The Act contains no affirmative provision for the inclusion of interest in an award thereunder, and interest is by direct implication excluded. The Act provides with clear particularity the measure of recovery to which a successful plaintiff is entitled in a proceeding instituted under section 16 (b) of the Act. Thus, the Act provides that successful plaintiffs shall recover "their unpaid minimum wages, or their unpaid overtime compensation, as the case may be," and "an additional equal amount as liquidated damages." In addition, provision is made for the allowance of a "reasonable attorney's fee to be paid by the defendant, and costs of the action." In view of the circumstance that detailed provision is made for the elements of recoverable damage including provision for attorney's fees and costs, it is apparent that the failure to include interest is intentional. The failure to provide for interest is for an obvious reason. Interest is the legal remedy for delayed payment. It is the damages a defendant pays for delay. But the Act here has provided for double damages as the remedy for all injury, including the injury of delay. As this Court pointed out, in *Overnight Motor Transportation Company* v. *Missel*, 316 U. S. 572 (1942) the statutory provision for liquidated damages recognizes that,

> "The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages."

It is obvious that Congress did not intend to award double damages to take care of the consequences of delayed payment and then to allow the award of interest, itself the price normally paid for delay, on those double damages. Two remedies for delayed payment are clearly not intended.

(b) In view of the fact that Congress did not include interest in the measure of damages recoverable under the Act the Court of Appeals erred in affirming an award of interest on the statutory double damages in reliance upon a state statute. The Court of Appeals relied on Section 480 of the New York Civil Practice Act as authorizing the inclusion of interest (R. 65). But interest may not be awarded pursuant to a state statute in an action under the Fair Labor Standards Act. Congress has, by its enactment of the Act, as between itself and the State legislature, completely occupied the field in the case of employees engaged in commerce and in the production of goods for commerce. Congress has prescribed the standards to be observed and, in detail, the remedies for failure to conform to the required standards. The states may no more add to, than they may detract from, those remedies. In this respect also the Act is analogous to the Federal Employers' Liability Act. In cases under the latter Act it has been consistently held that interest, authorized by state statute, may not be included in a judgment, under the federal act. Thus, in *Murmann* v. *The New York, New Haven and Hartford Railroad Company*, 258 N. Y. 447 (1942), it was held that the addition of interest, pursuant to a state statute, to a verdict returned under the Federal Employers' Liability Act was improper. In that case the Court pointed out, at page 450:

> "The federal legislation covers the whole field, and the power of the states is not broad enough to change the assessment of the damages as determined by the verdict."

The same principle has been consistently recognized in other decisions under the Federal Employers' Liability Act, both prior and subsequent to the *Hurmann* decision. (See, for example, *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* v. *Busby*, 41 F. (2d) 617 (C.C.A. 9, 1930) and *Mobile & Ohio Railroad Co.* v. *Williams*, 219 Ala. 238 (1939); *Bennett* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 187 Iowa 897 (1919)). The principle is of equal application under the present Act. Mr. Justice Schenck so noted in his dissenting opinion in the Appellate Division (R. 57). Mr. Justice Rifkind so held, in his decision in *Berry et al* v. *34 Irving Place Corporation*, —— F. Supp. —— (decided June 16, 1944) (D. C. S. D. N. Y.) and the Supreme Court of Alabama so recognized, in *Campbell* v. *Zavelo*, 243 Ala. 361, 366, 10 So. (2d) 29 (1942). Although the Circuit Court of Appeals for the Second Circuit, relying on the decision of the Court of Appeals of the State of New York in the instant case, has, since the decision in the *Berry* case, determined [4] that interest may be added to the plaintiff's recovery under Section 480 of the New York Civil Practice Act, neither the Circuit Court of Appeals nor any other Court has attempted to distinguish the uniform line of decisions, hereinbefore referred to, which hold that state statutes, awarding interest prior to judgment, cannot be availed of to add to the statutory recovery prescribed by Congress in a field which Congress has fully occupied. Such a distinction, it is submitted, cannot properly be made.

(c) There is a strong public interest in the review by this Court of the determination of the Court of Appeals of the State of New York that interest on the statutory double

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[4] In *Greenberg* v. *Arsenal Building Corporation et al.*—F (2d)—(decided July 18, 1944). A petition for writ of certiorari in the *Greenberg* proceeding is now pending in this Court.

damages may be included in a judgment under the Act. An important and novel federal question of substance has been decided by a State Court and erroneously decided. To the severe remedy of double damages provided in the Act, the New York courts have added an additional severe consequence not provided for in the Act and precluded by the Act. The decision of the Court of Appeals herein has already been adopted by one Court in the *Greenberg* case, (*supra*). If the decision of the New York court be not reviewed by this Court, other courts are likely to follow the New York precedent. A review is required to assure a proper decision.

CONCLUSION

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to the Supreme Court of the State of New York, commanding said Court to certify and send to this Honorable Court a full and complete transcript of the record and all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet and the circumstances of the case require, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper.

HENRY E. FOLEY,
Counsel for Petitioner.

Dated: September 11, 1944

APPENDIX.

Fair Labor Standards Act of 1938 (29 U. S. Code, Sections 203, *et seq.*).

Sec. 203 (b) "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof" (Sec. 3 [b]).

Sec. 207 (a) "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." (Sec. 7 [a]).

Sec. 216 (b) "Any employer who violates the provisions of Section 206 or Section 207 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action" (Sec. 16 [b]).